desirable that in a charge under section 6(a) the principal should be named in the charge, I am of the opinion that section 155 of the Criminal Procedure Code applies on the facts of this case. Section 155 of the Criminal Procedure Code provides as follows: —

"155. No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by that error or omission."

In my judgment it is clear beyond any doubt that the appellant was not, at any stage, in fact misled by the omission to state the name of his principal in the charges.

It is also submitted that the failure of the prosecution to give particulars of the "representations" alleged to have been made prejudiced the defence. For similar reasons I am of the opinion that this submission is also without real substance.

G. *Sentence.*

Mr. Newey, in his submission that the sentences were out of all proportion to the offences of which the appellant was convicted, stresses that no harm was suffered by the Government, that no wrong decisions were taken as a result of the appellant's acts, that the appellant gained very little and that in fact the only real benefit the appellant obtained was the cost of seven return air tickets to Jakarta. It is also submitted that it was not a case of corruption bargains being struck but a case where the appellant succumbed to Ong Keng Kok's wiles and became willing to accept some benefits. While accepting these submissions as correct on the facts, the real gravamen, so far as the appellant is concerned, is the fact that the offences were committed by him while he held ministerial office. In respect of the conviction on each of the four charges, which convictions for the reasons I have earlier set out I uphold, the appellant was sentenced to a term of six months imprisonment by the trial judge with consecutive sentences in respect of two charges making a total of eighteen months imprisonment. In my judgment the sentences as imposed by the trial judge were manifestly not excessive.

Accordingly, the appeals against the convictions and sentences in respect of the Amended 1st, 2nd, 3rd and 5th Charges are dismissed and the appeal against the conviction in respect of the Amended 4th Charge is allowed.

Order accordingly.

Solicitors: *David Marshall.*

MALAYSIAN REPORTS

LOH KON FAH v. LEE MOY LAN

[F.C. (Gill C.J. (Malaya), Ali and Ong Hock Sim F.JJ.) June 14, 1976]

[Ipoh — Federal Court Civil Appeal No. 61 of 1975]

Family Law — Guardianship of Infants — Discretion of trial judge — Whether exercised rightly — Powers and duties of appellate court in reviewing decision by court in the exercise of its discretion — Guardianship of Infants Act, 1961.

In this case the learned trial judge after hearing the parties, gave the respondent, the mother, custody of her three infant children with unrestricted access to them at all times by the appellant as the father (*ante* p. 88). In 1970 the respondent and the children by mutual agreement had moved to Singapore where they have lived ever since. The appellant visited the family regularly till 1973 when he stopped visiting them entirely. The appellant wanted his wife and children to return to Malaya but the respondent refused. In 1974 the appellant commenced proceedings in Ipoh for the custody of his children. The learned trial judge refused his application and he appealed to the Federal Court.

Held, (Gill C.J. and Ali F.J., Ong Hock Sim F.J. dissenting): having regard to the evidence before him it could not be said that the learned trial judge had wrongly exercised his discretion. The learned judge was quite right in taking the view that so long as the marriage subsisted between the parties and there were no obstacles in the way of the appellant visiting his children at any time the mother should have the custody. It was not possible in this case to say that the learned judge had either given weight to irrelevant or unproven matters or omitted to take into account matters that were relevant. It could not be said therefore that the decision of the learned judge was improper, unjust or wrong.

Cases referred to:-

(1) *Charles Osenton & Co.* v. *Johnson* [1942] A.C. 130, 138.
(2) *Evans* v. *Bartlam* [1937] A.C. 473, 486.
(3) *Gardner* v. *Jay* (1885) 29 Ch. D. 50, 58.
(4) *Ward* v. *James* [1966] 1 Q.B. 273, 293.
(5) *Hennall* v. *Ranaboldo* [1963] 1 W.L.R. 1391.
(6) *Grimshaw* v. *Dunbar* [1937] 1 Q.B. 408.
(7) *In re O (Infants)* [1971] 1 Ch. 748, 755.
(8) *Re F.* [1976] 1 All E.R. 417.
(9) *Blunt* v. *Blunt* [1943] A.C. 517, 526.
(10) *Re T. (Infants)* [1968] Ch. D. 704.
(11) *Re L (Infants)* [1962] 3 All E.R. 1.
(12) *Re F (an infant)* [1969] 2 All E.R. 766.
(13) *Sim Hong Boon* v. *Lois Joan Sim* [1973] 1 M.L.J. 1 at p. 3.

FEDERAL COURT.

Lim Kean Chye (*P. Leow* (Miss) with him) for the appellant.

Liew Choy-Hung (Miss) for the respondent.

Gill C.J. (Malaya): This was an appeal from an order of Hashim Yeop Sani J. giving the respondent, as the mother, custody of her three infant children with unrestricted access to them at all times by the appellant as the father. We dismissed the appeal (with Ong Hock Sim F.J. dissenting) and stated that we would give our reasons later. I now proceed to state my reasons.

As the facts of the case are set out with the greatest care and clarity in the learned judge's judgment, and there has been no substantial criticism of his findings of fact, based on the evidence of the

witnesses whom he saw and heard giving evidence, I need give only a brief summary of them. The parties were married in December 1964 after which they lived with the appellant's parents in Ipoh where the children were born in the years 1965, 1967 and 1968 respectively. Because of some differences between the respondent and her in-laws the parties set up a home of their own at Jalan Bunga Telor, Canning Garden, Ipoh in June 1970. At about that time the appellant was about to engage in some business ventures in Kelantan which would necessitate his being away from home for long periods. For this reason and also because the parties felt uncertain about the education system in Malaya after the civil disorder in May 1969, by mutual agreement the respondent and the children moved to Singapore where they have lived ever since.

The appellant visited the family regularly until the end of 1973 when he stopped visiting them altogether. He said that he stopped his visits to the family because he felt unwelcome by the respondent who treated him as a guest rather than as a husband and father to the infants. This, however, was denied by the respondent. The truth would appear to be that in the latter part of 1973 the appellant changed his mind about his wife and children living in Singapore because his business in Malaysia had flourished and he found that owing to the changed economic situation in this country it would be in the best interests of his family to live in Malaysia where he had all his business commitments and was a director of a number of firms. Accordingly he wrote to the respondent on November 7, 1973 requesting her to return to Ipoh with the infants. But she refused to do so. On April 24, 1974 the appellant commenced proceedings in the High Court at Ipoh asking for custody of his infant children. The respondent resisted the application on the grounds, first, that as the appellant was highly involved with his business interests and was therefore constantly on the move, there was no certainty that he would give attention to the children, and secondly, that a move from Singapore to Ipoh would be detrimental to the children because it would uproot them from an environment with which they had already become familiar. She further alleged that the children were doing well at schools in Singapore and that it would be against their interest to return to Malaysia to a new system of education. As regards the appellant's anxiety about the children's knowledge of Bahasa Malaysia, she maintained that the children were in fact being taught Bahasa Malaysia in their present schools.

Having considered all the evidence before him and bearing in mind the general rules as regards the making of orders in custody cases, the learned judge made the order appealed from.

As counsel for the appellant stated at the very outset of the hearing of the appeal before us, the question which we had to decide was whether in making the order the learned judge had exercised his discretion rightly. The appeal therefore raised the question as to the powers and duties of an appellate court when it is asked to review a decision made by the court below in the exercise of its discretion, and in particular when the court below has seen and heard witnesses.

As stated by Viscount Simon L.C. in *Charles Osenton & Co.* v. *Johnson*,[1] the law as to the reversal by a Court of Appeal of an order made by the judge below in the exercise of discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. His Lordship then went on to say:

"The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

He then quoted the following statement of Lord Wright in *Evans* v. *Bartlam*[2]:

"It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus in *Gardner* v. *Jay*,[3] Bowen L.J. in discussing the discretion of the judge as regards mode of trial says: 'That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it will be reviewed.'"

Lord Denning M.R. in his judgment in *Ward* v. *James*[4] with which four other members of the court agreed, said:

"Reviewing Discretion. This brings me to the question: in what circumstances will the Court of Appeal interfere with the discretion of the judge? At one time it was said that it would interfere only if he had gone wrong in principle. But since *Evans* v. *Bartlam*,[2] that idea has been exploded. The true proposition was stated by Lord Wright in *Charles Osenton & Co.* v. *Johnson*.[1] This court can and will, interfere if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him. A good example is *Charles Osenton & Co.* v. *Johnson*[1] itself, where Tucker J. in his discretion ordered trial by an official referee, and the House of Lords reversed it because he had not given due weight to the fact that the professional reputation of surveyors was at stake. Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him, as in *Hennell* v. *Ranaboldo*.[5] It sometime happens that the judge has given reasons which enable this court to know the considerations which have weighed with him; but even if he has given no reasons, the court may infer, simply from the way he has decided, that the judge must have gone wrong in one respect or the other, and will thereupon reverse his decision: see *Grimshaw* v. *Dunbar*."[6]

In the case of *In re O. (Infants)*[7] Davies L.J. stated the general principle in the following terms:

"In my considered opinion the law now is that if an appellate court is satisfied that the decision of the court below is wrong, it is its duty to say so and to act accordingly. This applies whether this appeal is an interlocutory or a final appeal,

whether it is an appeal from justices to a Chancery Judge or from justices to a Divisional Court of the Divorce Division. Every court has a duty to do its best to arrive at a proper and just decision. If an appellate court is satisfied that the decision of the court below is improper, unjust or wrong, then the decision must be set aside. I am quite unable to subscribe to the view that a decision must be treated as sacrosanct because it was made in the exercise of 'discretion': so to do might well perpetuate injustice."

All the cases which I have cited above were considered by Brown L.J. in the recent case of *Re F.*[8] In the course of his judgment his Lordship said at page 434:

"I accept that where an appellate court can see that the court below in exercising its discretion in an infant (or any other) case has been influenced in its decision to a decisive, or probably even to a substantial, extent by its impressions based on seeing and hearing the witnesses, the appellate court should be very reluctant to interfere. I am not prepared to go so far as to say that it should never interfere, even in those circumstances."

While still on this topic, it would be useful to quote the following passage from the judgment of Viscount Simon L.C. in *Blunt* v. *Blunt*[9]:

"This brings me to a consideration of the circumstances in which an appeal may be successfully brought against the exercise of the divorce court's discretion. If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court's discretion will have been exercised on wrong or inadequate materials...."

In the present case, in making the order for the care and control of the infants to remain with the mother, the learned judge took into account a number of factors. As he has stated in his judgment, at the outset he was inclined to the view that in the light of the present conflict between the parents neither of them could be said to be a "wrong-doer" in the real sense of the word. But he went on to point out that as the initial move from Ipoh to Singapore was mutually agreed upon between the parents for reasons of their own, the facts here differed from the facts *in Re T (Infants)*[10] where the mother had secretly taken the infants out of jurisdiction. He also took the view that the refusal of the respondent to return to Ipoh so as not to up-root the infants from the environment with which they had become familiar could not be said to be unreasonable.

From what the learned judge saw of the infants in chambers he was satisfied that they were well taken care of, healthy and bright, which he attributed substantially to the love and care given by the respondent. Although the respondent had categorically stated in her testimony that she would not go back to the appellant under the present circumstances, the learned judge did not think it would be just for the court for that reason alone to take the risk and deprive the infants of the continued devotion and care of the respondent under which they had obviously thrived. His Lordship then went on to state as follows: —

"I am still optimistic that the parties may solve their differences since the refusal of the respondent to return to the applicant for the present would seem to me, if the evidence is anything to go by, based only on the fear of domination from the parents of the applicant which may or may not be justified and her suspicion of the *bona fides* of the applicant."

On the other hand, the learned judge had no doubt whatsoever of the love and affection the appellant has for his children, and of the fact that he is a good provider. He therefore had no doubt that if custody of the infants was given to the appellant he was in a position to shower them with all the material advantages that a well-to-do parent can give. But this, he thought, could not be the sole consideration in making an order of custody in his favour.

Summarising the attitudes of the parties, the learned judge had this to say. The appellant wanted custody with or without the respondent. The respondent wanted custody but was not prepared to leave Singapore for the reasons which she had given. Both parties loved the infants, so that whoever was given custody the children would get the necessary care, love and devotion. The learned judge then went on to observe:

"But one must always remember that the ideal condition for the children would be to grow up in a home in the love and security of both parents. But if the ideal situation is not possible then the infants should not be deprived of the love and devotion of their natural mother if the mother has been shown capable of giving them. I do not think that all the material advantages that the applicant here can give can substitute for the care and devotion which the respondent has shown to her children."

As regards the grounds put forward by the appellant for the need to change the education system for the children, the learned judge found no merit in them simply because he did not think there was any substantial difference in the education received in Singapore and the education received in this country, especially for the purposes of taking over the applicant's businesses in the future. His Lordship went on to point out that it was common in this country for parents to send their children for education to Singapore for personal and other reasons.

Although there seemed for the time being to be some differences between the parties in connection with their marriage, the learned judge did not think that he should at that stage take such differences into account for making any order of custody. On the evidence before him these differences seemed to him to be based solely on the fear on the part of the respondent of domination by the appellant's parents if she were to return to Ipoh and the feeling on the part of the appellant of being unwelcome whenever he visited his family in Singapore. These differences in the learned judge's view were not really so grave as to be irreconcilable and could be solved if the parties behaved rationally. The fact that each party had shown tremendous love for the children was a good sign in that direction. The learned judge concluded his observations on this aspect of the matter by saying that a final order as to custody should only be determined within the context and framework of any proceedings for dissolution of the marriage.

In all the circumstances of the case the learned judge had no doubt that at least for the moment it would be in the best interest and welfare of the infants that their custody should be vested with the respondent. He therefore made an order accordingly giving the appellant an unrestricted access to the infants at all times.

The arguments by counsel for the appellant in support of the appeal before us proceeded on these lines. The refusal of the wife to go back to Ipoh with the children or hand over custody to the husband was wrong. Although the children were taken to Singapore with the father's consent, that consent was withdrawn in 1973. There was no evidence of any likelihood of emotional upset if the children were taken away from their mother. The court had to consider the economic situation of the parents, there being a tremendous disparity between what the father could provide for the children and what the mother could provide. The father was not allowed to have free access to the children. The fact that there may be reconciliation between the parties was irrelevant. The court must not consider sentimental reasons alone. The learned judge was wrong in thinking that other things being equal, the mother should not be deprived of the custody of the children. He also treated the whole matter as interlocutory. These last two factors were sufficient for the appeal to be allowed. He should have taken all the factors into consideration bearing in mind the long term welfare of the children, instead of making an order which was in the nature of an interlocutory order.

With great respect to the arguments put forward by the learned counsel for the appellant, it would seem clear from the most careful and detailed analysis of the facts of the case by the learned trial judge that he took all the relevant factors into consideration. The order which he made was certainly not an interlocutory order, because it has been rightly said that in the nature of things there is no finality about a custody order. As circumstances change the parties are entitled to go before the court again to have any previous order reviewed. The appellant was given unrestricted access to the children. Although Singapore is a foreign territory, only a causeway separates it from Malaysia and people travel about quite freely between the two countries on what are called restricted passports. It was open to the appellant to ask the learned judge to make an order that the children be sent to Ipoh to be with him during the school holidays. But this he chose not to do, clearly because he wanted the custody of the children at any cost.

In my judgment the learned judge was quite right in taking the view that so long as the marriage subsisted between the parties and there were no obstacles in the way of the appellant visiting his children at any time, the mother should have the custody. There was evidence that the eldest child, a girl, was doing remarkably well at school in Singapore and so were the other two children. The learned judge must have had in mind the emotional upset if the children were torn away from the mother. Speaking for myself, it was impossible for me to say that the learned judge had either given weight to irrelevant or unproved matters or omitted to take into account matters that were relevant. Nor was I in a position to say that the decision of the learned judge was improper, unjust or wrong.

For the reasons I have stated I reached the conclusion that the appeal be dismissed.

Ali F.J.: This is an appeal from the dismissal of an application for custody by the father of three infants, a daughter aged about 11 and two sons aged about 9 and 8 respectively.

By a majority (Ong Hock Sim F.J. dissenting) we dismissed the appeal indicating that, if necessary, we would give our reasons in writing later. I have since received a copy of the judgment of the learned Chief Justice with which I am entirely in agreement.

I only wish to add a few words. I must admit that this is not an easy case to decide. Both parties have good reasons for wanting custody. The father, the appellant, is undoubtedly in a much better position financially than the mother to provide for the children. He can provide them with a home and all other material things in life. In point of fact he did offer to buy a house in Ipoh, Perak, for them. Although he did not say so it seems clear that he knew that one of the reasons why his wife was not too keen to return to Ipoh was because she did not want to live under the same roof with her husband's parents.

One very important feature of this case is that the wife and the children had gone to live in Singapore with the knowledge and consent of the husband who was then travelling about so much for his business purposes.

The learned judge observed that this is not a case of the wife leaving the husband and taking away the children. On that ground he said cases involving a wife deserting her husband and taking away the children should be distinguished. I agree.

Another important feature is that neither the wife nor the husband had said anything about taking divorce proceedings. The husband wanting the children so much seemed prepared to be reconciled with the wife who, however, has categorically stated that there is no likelihood of reconciliation. The learned judge, on the other hand, seemed optimistic. He said reconciliation should not be ruled out until proceedings for dissolution have come before the court. Since all the children were doing well in schools in Singapore and are being well looked after by the wife he thought it best for the welfare of the children that for the time being they should be where they are now.

Having regard to the evidence before him I am not prepared to say that the learned judge has wrongly exercised his discretion. Indeed, I think this is one of those cases in which the appellate court should not interfere with the exercise of a discretion.

For that reason, mainly, I agreed with the learned Chief Justice that the appeal be dismissed with costs.

Ong Hock Sim F.J.: This appeal is from a decision of the High Court at Ipoh dismissing an application by the appellant for custody of three children of the marriage, a daughter born on 8.10.1965, two sons born on 28-1-1967 and 8.3.1968 respectively, now living with their mother, the respondent, in Singapore. The application was by Originating Summons intituled "In the matter of the Guardianship of Infants Act, 1961." The relevant sections of the Act are as follows: —

"5. Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property:

Provided that the court or a judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent."

"11. The court or a judge, in exercising the powers conferred by the foregoing provisions of this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be."

As counsel for the appellant indicated at the outset of the appeal, it was a discretion case and the appellant would have to show that the judge exercised that discretion wrongly.

In what circumstances an appellate court ought to reverse or vary an order made in the exercise of his discretion by a judge is set out in the well-known passage from Viscount Simon L.C.'s speech in *Blunt* v. *Blunt*[9]:

"This brings me to a consideration of the circumstances in which an appeal may be successfully brought against the exercise of the Divorce Court's discretion. If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court's discretion will have been exercised on wrong or inadequate materials. But, as was recently pointed out in this House in another connection in *Charles Osenton & Co.* v. *Johnston* (1): 'The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations ... then the reversal of the order on appeal may be justified.' ...."

The facts are clearly set out in the judgment and I will deal briefly with only such as, in my view, are relevant and undisputed. The parents agreed to the move to Singapore in mid-1970 and the respondent took the infants to Singapore where they are now housed at 4, Crichton Close, Singapore, which was bought jointly by the respondent and a younger brother of the appellant, an engineer with the Singapore Government. The appellant now desires that the respondent and the children return to Ipoh where he is renovating the house at 2, Golf Club Road for their occupation. His reasons for doing so as appears from his affidavit and testimony in court may be summarised as follows:

(a) It would be in the interests of the family to live in Malaysia, owing to the changed economic situation and where all his business commitments lie;

(b) Both parties and the children are Malaysians;

(c) Both parties have their close relatives in Ipoh;

(d) The appellant still hopes for reconciliation with the respondent and there are no proceedings with regard to the marriage.

The respondent resists the application, as the learned judge says "on the grounds, namely, that the applicant is highly involved with his business interests ... and can spend very little time with the children ... Such a move would be detrimental to the children because it would uproot them from an environment with which they have already become familiar. All the children are doing very well in schools ... and it would also be utterly against their interests to return to Malaysia to a new system of education."

The trial judge quoted from *Halsbury's* (Third Edition), Volume 21 at page 194: —

"The court, in making orders as to custody or access, will have regard to the conduct of the parents and to the wishes as well of the mother as of the father. It will exercise its jurisdiction to interfere in the interests of a child on account of the father's conduct, if it is satisfied that he has so conducted himself, or has shown himself to be a person of such a description or is placed in such a position as to render it practically essential to the safety or welfare of the child that the father's right should be treated as lost or suspended and should be superseded or interfered with ...."

He went on to summarise the position of the parties, saying

"the applicant wants the infants back to be with him and the children to receive their education in this country. According to him if respondent is not willing to come back to him reasonable access to the children will be given to her. If she is willing to come back to him he is prepared to make sacrifices and 'tolerate to the end.' The respondent, on the other hand, wants to have custody of the children in Singapore where she can continue to give the children her care and devotion. According to her, uprooting the children from their present environment would be detrimental to them as they are doing very well in their education and their extramural activities. According to her, however, her marriage to the applicant has reached 'a point of no return.' But she denied in cross-examination that she has asked the applicant for a divorce.

Therefore the wishes of the parents are clear cut; each wants custody of the children."

He was satisfied, on the evidence before him, that "whoever will be given custody of the infants, the infants will get the necessary care, love and devotion."

Of the applicant he says

"I have no doubt whatsoever of the love and affection the applicant has for his children and that he is a good provider ... if custody is given to him of the infants he is in a position to shower them with all the material advantages that a well-to-do parent can give .... In court in the witness box he said he will sacrifice everything and tolerate to the end as long as the respondent and the infants come back to him."

I would agree with him when he says further "these cannot be the sole consideration in making an order of custody in his favour." As was said in *Re L. (Infants)*[11]: —

"Although in determining the question to which parent the care and control of an infant ward of court should be committed, the infant's welfare was the first and paramount consideration, yet it was not the sole consideration, and where one spouse alone was responsible for the breakup of the matrimonial home, consideration should also be given to the claims of the other spouse."

Section 11 of the Guardianship of Infants Act, 1961 reads that the court shall have regard primarily for the welfare of the infant, whereas the United Kingdom Act says the court shall regard the welfare of the infant as "the first and paramount consideration" in any case involving care and custody of the infant. In coming to a decision the court should take account of all relevant matters. As Megarry J. says in *Re F. (an infant)*[12]: —

"In deciding this issue, I begin with my duty under the Guardianship of Infants Act 1925, s.1, to 'regard the welfare of the infant as the first and paramount consideration', disregarding whether from any other point of view the father's claim is superior to the mother's or *vice versa*. I also bear in mind the decision of the Court of Appeal in *Re L.* (infants) (cit), that 'paramount' does not mean 'exclusive.' The welfare of the ward is to be the pre-eminent or superior consideration; but that does not mean that I should leave out of account the conduct of the parties.... Despite certain logical difficulties... in these cases the court should consider and weigh all the circumstances that are of any relevance. Quite apart from authority, the word 'first' in the section implies that there are other circumstances that are to be considered in this process of consideration and weighing. In doing this, a special weight must be given to the welfare of the infant... it may be that the welfare of the infant would be equally served whichever parents has care and control;.. In those circumstances, the other considerations may be sufficiently strong to determine the matter.

... What the court has to deal with is the lives of human beings, and these cannot be regulated by formulae.

... In matters of discretion it may at times be impossible to do much more than ensure that the judicial mind is brought to bear, with a proper emphasis, on all that is relevant, to the exclusion of all that is irrelevant."

It may perhaps be appropriate at this time to scrutinise the testimony of the respondent from her affidavit and oral testimony. It is not disputed that the judge had seen the children in chambers and they "appeared well taken care of, healthy and bright" which he attributed "substantially to the love and care given by the respondent." In the light of the earlier conclusions of the judge with regard to the appellant, the only justification for denial of the application was that "the infants should not be deprived of the love and devotion of their natural mother" and that all the material advantages that the applicant here can give cannot substitute for the care and devotion which the respondent has shown for her children With respect, this ignores the other parent's rights, for it was clear from the evidence that the children are losing contact with their father and the "youngest son does not know the father". "The children are not attached to their father." Is it right for children to grow up denying their father? What were the reasons why "the ideal situation for the children ... to grow up in a home in the love and security of both parents" was not possible? The respondent categorically stated that she would not go back to the applicant "as her marriage has reached 'a point of no return' ... our marriage has no chance of reconciliation ... I have no more love for my husband .. Under no circumstances will I return to Ipoh to my husband." That was because of "parents-in-law bullying my husband" and involvements in family disputes indirectly. In view of the firm assertions in court by respondent, what grounds were there for the learned judge to find that "the refusal to return was not unreasonable and the differences are ... not really so grave that the parties will never be reconciled" or to be "optimistic that the parties may solve their differences." Here I would quote Lord Denning M.R. in *Re. L.* (cit. at page 3): —

"Of course, the discretion of a judge who has seen the parties in a case of this kind is very important, but... it seems to me... whilst a judge is right to give great weight to the welfare of the children, and indeed to make it,... the first and paramount consideration,... it is not the sole consideration. In this case whilst no doubt the mother is a good mother in one sense of the word, in that she looks after the children well, giving them love and, as far as she can, security, one must remember that to be a good mother involves not only looking after the children, but making and keeping a home for them with their father, bringing up the two children in the love and security of the home with both parents. In so far as she herself by her conduct broke up that home, she is not a good mother."

The reasons for refusal to return were not for any ill-treatment, misconduct or other matrimonial offence on the part of the appellant. I respectfully disagree with the view taken in the lower court that "neither of the parents of these infants can be said to be a wrong-doer in the real sense of the word." And as Lord Denning M.R. continues: —

"Now what is to be done? I realise that as a general rule it is better for little girls to be brought up by their mother, but, nevertheless, if these children are to be given to the mother now, I can see no chance of reconciliation, whereas if they remain with their father, there may be some hope, even if it is only a faint hope, that she will return for the sake of the children themselves: and if only that would happen, their welfare would be ensured in the best way of all. Even if there were no chance of the mother returning at all, I do not think that she should on that account be entitled to take the children from their father who has done no wrong.... It seems to me that a mother must realise that if she leaves and breaks up her home in this way, she cannot as of right demand to take the children from the father.... He has a good home for the children. He is ready to forgive his wife and have her back. All that he wishes is for her return. It is a matter of simple justice between them that he should have the care and control. Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked."

Harman L.J. concurring said: —

"It is not the law, and it never has been, that no consideration shall be given to the spouse who has been deserted, whose home has been blasted, whose matrimonial felicity has been ended through no fault of his."

Russell L.J. also agreeing had this to say: —

"... as a mother... one of her main duties, to the children to maintain for them a joint home with both their parents. ... It is true, particularly in the case of the parental jurisdiction connected with the care and control of wards of court, that a decision which is discretionary in nature is rarely to be upset by the Court of Appeal; but when one finds that the learned judge does not on the face of it appear to have approached the matter in the correct manner, then it is the duty of the Court of Appeal to go behind his judgment and substitute what they consider to be the correct decision."

One factor, other than the disruptive aspect involved in separating the children from the mother who has been caring for them since their birth, I think the long term interests of the children must also be taken into account. As Wee Chong Jin C.J. (Singapore) said in *Sim Hong Boon* v. *Lois Joan Sim*[13]: —

"In any event it is not the immediate readjustment that must necessarily have to take place but in our view throughout the entire period until that child becomes capable of looking after himself, in other words, becomes an adult, that ought to be considered."

Whilst I endorse Megarry J.'s reasons in *Re F. (an infant)* (cit.) for leaving the infant with the mother, this case is very closely identical with *Re L. (infants)* (cit.), and for that reason, I would for my part, allow this appeal.

There will be no order as to costs.

Appeal dismissed.

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